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9 *Rhapsody International, Inc.*

10  
11 **UNITED STATES DISTRICT COURT**  
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**  
13 **OAKLAND DIVISION**

14 DAVID LOWERY,  
15 VICTOR KRUMMENACHER,  
16 GREG LISHER, and  
17 DAVID FARAGHER, individually and on  
18 behalf of themselves and all others similarly  
19 situated,

Plaintiffs,

v.

19 RHAPSODY INTERNATIONAL INC.,

20 Defendant.

Case No. 4:16-CV-01135-JSW

**DEFENDANT RHAPSODY  
INTERNATIONAL INC.'S REPLY IN  
SUPPORT OF CALCULATION OF  
FEES AFTER REMAND**

1 In its recently-filed Opposition, Rhapsody showed why neither the NMPA settlement, the  
 2 MMA, nor the costs Rhapsody paid may be included in the basket of class benefits. *See* Dkt. 310.  
 3 The abridged version is that the evidence of record shows that the NMPA settlement and the  
 4 MMA originated before this lawsuit was filed, *id.* at 3:1-11, and Plaintiffs cite no evidence in  
 5 support of their argument that they “precipitated” either one. *See* Pltfs. Opp., Dkt. 309 at 5:19-6:1.  
 6 Also, because Plaintiffs failed to place a value on them, or even explain how they benefited the  
 7 class, these alleged benefits are hypothetical only, and the Ninth Circuit precludes courts from  
 8 considering hypothetical benefits as a component of class relief. Dkt. 310. at 3:15-18. Finally, the  
 9 costs at issue may not be counted towards fees in a non-common fund case. *Id.* at 3:21-4:6.

10 The NMPA and the MMA have been features of this case almost from day one—close to  
 11 **eight years**. Plaintiffs discussed both when they first moved for fees almost four years ago. In  
 12 that motion, they argued for a 2.87 multiplier of their lodestar, based partly on their claim that the  
 13 NMPA and the MMA showed the “novelty and difficulty of this case.” Dkt. 208 at 14:11-15:4.  
 14 The Ninth Circuit’s statement that, on remand, this Court should focus on the “approximately  
 15 \$50,000 paid to class members, along with any other benefits to the class,” when read in light of  
 16 the whole opinion, likely refers to the Court’s decision to leave open whether or not **costs**  
 17 Rhapsody paid could be counted as class relief for the purpose of assessing fees. It surely was not  
 18 an invitation to plaintiffs to push a new theory of benefit that has always been available to them.

19 Plaintiffs fault Rhapsody for allegedly not citing authority to support its argument that  
 20 costs cannot be a basis for fees in a non-common fund case. But Rhapsody has done so and has  
 21 also explained why *Staton v. Boeing Co.*, 327 F. 3d 938 (9th Cir. 2003) and *Life Time Fitness, Inc.*  
 22 *(TCPA ) Litig.*, 847 F. 3d 619 (8th Cir. 2017) do not support Plaintiffs’ argument. *See* Dkt. 310 at  
 23 4:1-6. In ransom note fashion, Plaintiffs pluck words and phrases from several pages of *In re*  
 24 *Bluetooth Headset Prods. Liab. Litig.*, 654 F. 3d 935 (9th Cir. 2011) to argue this Court should—  
 25 now—create a “constructive common fund” and add those costs to it. They leave out the language  
 26 where the Ninth Circuit defines a fund as being a product of agreement, starting with the parties  
 27  
 28

1 agreeing to an amount for class relief. *Id.* at 943.<sup>1</sup> There is no such agreement here; this was a  
 2 claims-made settlement. There is no agreed-upon fund for class relief to which additional sums  
 3 can be added to create a constructive fund. Moreover, in *Bluetooth*, it was part of the mandate that  
 4 the district court decide on remand whether there was a constructive fund. *Id.* at 945. The Ninth  
 5 Circuit did not so order here.

6 There is simply no basis for this Court to award Plaintiffs fees based on anything other  
 7 than the \$52,841.05 the class actually received. Their demand for \$1.2 million is based on no  
 8 evidence and still amounts to 23 times the only proven class benefit.

9 DATED: March 11, 2024

QUINN EMANUEL URQUHART &  
 SULLIVAN, LLP

12 By /s/ Karin Kramer

Karin Kramer  
 Attorneys for Defendant,  
 Rhapsody International, Inc.

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 20 <sup>1</sup> *Bluetooth* at 943: “Several courts have embraced the constructive common fund approach,  
 21 warning that ‘private agreements to structure artificially separate fee and settlement arrangements’  
 22 should not enable parties to circumvent the 25% benchmark requirement on ‘what is in economic  
 23 reality a common fund situation.’ *In re Gen. Motors*, 55 F.3d at 821; *see Johnston v. Comerica*  
 24 *Mortg. Corp.*, 83 F.3d 241, 246 (8th Cir.1996) (‘[I]n essence the entire settlement amount comes  
 25 from the same source. The award to the class and the agreement on attorney fees represent a  
 26 package deal.’); *cf. Manual for Complex Litig.* § 21.75 (4th ed. 2008) (‘If an agreement is reached  
 27 on the amount of a settlement fund and a separate amount for attorney fees ... the sum of the two  
 28 amounts ordinarily should be treated as a settlement fund for the benefit of the class.’).”